

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRENT ALLEN GARDNER,

Defendant-Appellant.

UNPUBLISHED

October 20, 2011

No. 297981

Jackson Circuit Court

LC No. 09-005355-FH

Before: M. J. KELLY, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

A jury convicted defendant of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and one count of felon in possession of a firearm, MCL 750.224f. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to prison terms of 19 to 40 years for each assault conviction and for the felon in possession of a firearm conviction, and to a two-year term for each felony-firearm conviction. Defendant appeals as of right. We affirm.

On April 3, 2007, two children, aged 11 and 15, were shot with a shotgun while playing outside on Jackson Street in Jackson, Michigan. Although there were several eyewitnesses, no one could provide a detailed description of the shooter and police eventually considered the case a cold case. On May 29, 2009, police officers responded to a domestic disturbance at the home of defendant and his wife, Peggy Gardner. Peggy informed the police at that time that defendant was responsible for the Jackson Street shooting. At the police station, Peggy provided officers with a signed statement implicating defendant. Peggy also participated in a videotaped interview with a detective. During the interview, Peggy described details of the shooting that were not previously made public such as the escape route, the fact that a shotgun was used, and the specific type of shotgun ammunition that was involved. In response to the information provided by Peggy, police officers obtained a warrant, searched defendant's home, and eventually arrested defendant in connection with the shootings.

Peggy testified at defendant's preliminary hearing and reiterated exactly what she told the detective during her interview. However, during trial, Peggy suggested that the medication she was on at the time of the interview and the preliminary examination caused her to be paranoid and aggressive, and that while what she said was "her truth" at the time, she believed it all might

have been a “made memory.” Peggy eventually testified at trial to almost all the information she conveyed during the interview and the preliminary hearing; however, she was equivocal and uncooperative.

On appeal, defendant argues that the trial court erred when it permitted the prosecution to play at trial the videotaped interview between Peggy and a detective. We review preserved evidentiary issues for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). “A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes.” *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). If an abuse of discretion is found, reversal is not required unless “after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative.” *Lukity*, 460 Mich at 495-496 (quotations omitted).

The trial court found that the videotape was admissible under MRE 801(d)(1)(B) as a prior consistent statement relevant to rebut a charge of improper influence or motive. Defense counsel objected on the ground that the videotape constituted a prior consistent statement that did not act to rebut anything. On appeal, defendant argues that the introduction of the videotape improperly bolstered Peggy’s testimony implicating defendant. “As a general rule, neither party in a criminal trial is permitted to bolster a witness’ testimony by seeking admission of a prior consistent statement made by that witness.” *People v Lewis*, 160 Mich App 20, 29; 408 NW2d 94 (1987). This Court in *Lewis* recognized that there are exceptions to this rule, but that the exceptions apply only “if the earlier consistent statement was given at a time prior to the existence of any fact which would motivate bias, interest, or corruption on the part of the witness.” *Id.* See also MRE 801(d)(1)(B). In *People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000), quoting *United States v Bao*, 189 F3d 860, 864 (CA 9, 1999), this Court noted that MRE 801(d)(1)(B) is identical to its federal counterpart and explained that a party offering a prior consistent statement must establish four elements:

(1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant’s testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant’s challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose.

We find that the trial court abused its discretion by admitting the videotape into evidence because Peggy’s prior statement does not meet all four elements of the test set forth in *Jones*, 240 Mich App at 707. Element two is not satisfied because the express or implied charge of improper influence or motive referred to Peggy’s previous testimony and statements, not to her trial testimony. The implied improper influence or motive arose from evidence that defendant suggested to Peggy that she should claim her prior statements implicating defendant were false because of medication she was taking. During trial, Peggy testified that she had doubts about the accuracy of her previous testimony and statements to police because of medication she was on at that time. The third element is similarly not satisfied by the facts of this case. The third element requires the proponent to “offer a prior consistent statement that is consistent with the declarant’s challenged in-court testimony.” *Jones*, 240 Mich App at 707. The prior consistent statement

depicted in the videotape was not entirely consistent with the challenged in-court testimony because the in-court testimony that was being challenged was Peggy's testimony that what she previously told police was not accurate. Accordingly, it was error for the trial court to permit the admission of the video as a prior consistent statement pursuant to MRE 801(d)(1)(B).

While we find that the admission of the video was erroneous, we must evaluate the effect of the error by assessing it in "the context of the [other] evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Lukity*, 460 Mich at 495. We find that the erroneous admission of the videotaped interview did not constitute error requiring reversal. Peggy testified at trial to nearly all of the information that was depicted in the videotape *before* the videotape was admitted. Further, she testified that she previously provided police with a signed statement implicating defendant, and that she implicated defendant during an interview with a detective. Thus, the jury would have been aware of the substance of the interview between Peggy and the detective even if the videotape had not been admitted into evidence. In *People v Rodriguez*, 216 Mich App 329, 332; 549 NW2d 359 (1996), this Court held that "mere cumulative evidence" was not prejudicial to the defendant and the erroneous admission of a prior consistent statements was harmless. We cannot conclude that the erroneous admission of Peggy's previous consistent statements to the detective affected the outcome of the trial because the jury was already aware of the content of the videotaped interview before it was played during trial. Additionally, the erroneous admission of the videotape did not deny defendant his right to a fair trial. In *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003), this Court recognized that defendants are "entitled to a fair trial, not a perfect one." Defendant was not denied a fair trial because the error was not outcome determinative.

Defendant also raises several issues in his Standard 4 brief. First, defendant argues that he was denied the effective assistance of counsel. Our review is limited to mistakes apparent on the record because there was no evidentiary hearing in the trial court. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). In order to prevail on an ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that trial counsel's performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303, 311-312; 521 NW2d 797 (1994). To the extent that a claim of ineffective assistance relies on facts not of record, it is "incumbent" on a defendant to "make a testimonial record . . . which evidentially supports his claim and which excludes reasonable hypotheses consistent with the view that his trial lawyer represented him adequately." *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973). "[D]efendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant first argues that defense counsel was ineffective because counsel failed to interview eyewitnesses, failed to call Charles Schmucker as a witness, failed to hire a ballistics expert, and failed to hire an investigator. Defendant has failed to establish the factual predicate for any of these claims of ineffective assistance of counsel and, consequently, has not demonstrated that defense counsel was deficient. *Hoag*, 460 Mich at 6. Defendant has not offered any affidavits or other evidence to support his claims of ineffective assistance. There is nothing in the record that suggests defense counsel failed to interview eyewitnesses. Further, defendant does not provide an affidavit regarding what Schmucker would testify to; therefore, there is no reason to believe that the failure to call Schmucker deprived defendant of a substantial

defense. See *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defendant failed to identify an expert witness who would have testified in the manner he claims in regard to the contents of rock salt and the shotgun shells. Finally, defendant failed to explain how an investigator would have aided his case. Therefore, defendant failed to meet his burden of demonstrating that defense counsel was deficient, *Hoag*, 460 Mich at 6, and he has not established his claim of ineffective assistance of counsel. *Pickens*, 446 Mich at 302-303.

Defendant also argues that defense counsel should have recused himself because defense counsel needed to testify regarding conversations between himself and defendant's wife. However, defendant has failed to show that defense counsel and defendant's wife had any conversation pertinent to defendant's case. He has also failed to offer the substance of the proposed testimony. Thus, defendant has failed to establish a factual predicate for this claim of error. *Hoag*, 460 Mich at 6. Defendant also argues that defense counsel failed to present evidence of a statement a witness gave police that conflicted with the witness' trial testimony. Defendant proffers on appeal a copy of a police report to support his claim. However, the witness whose testimony defendant claimed was inconsistent with what police were told was not named in the police report; thus, defendant failed to establish a factual predicate for this claim. *Id.*

Next, defendant argues that the prosecutor committed misconduct by permitting perjury, and that this misconduct denied him a fair trial. Specifically, defendant points to the testimony of two eyewitnesses that was inconsistent with the testimony of two police officers. The first witness testified that she thought the shooter was dressed in all black. The witness testified that she did not remember giving police any further details regarding the appearance of the shooter. However, an officer testified that the witness told him the shooter was a black male dressed in all black. The other eyewitness testified that she did not remember telling police the shooter was a black male or giving police a specific individual's name. However, a detective testified that the witness told him the shooter was a specific person.

In *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998), this Court explained that prosecutors have a "constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath." A prosecutor may not knowingly use false testimony to obtain a conviction and has a duty to correct false evidence. *Id.* Because there was no objection to the prosecution's conduct during trial, we review defendant's argument for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999). Substantial rights are affected when the defendant is prejudiced, meaning the error affected the outcome of the trial. *Id.* at 763.

Defendant has failed to establish plain error affecting substantial rights. There is no evidence that perjury was committed by any witness. The testimony that defendant argues constitutes perjury is not actually perjury. In *In re Contempt of Henry*, 282 Mich App 656, 677-678; 765 NW2d 44 (2009) this Court explained that the elements of perjury are: "(1) the administration . . . of an oath authorized by law, by competent authority; (2) an issue or cause to which facts sworn to are material; and (3) willful false statements or testimony . . . regarding such facts." In this case, there is absolutely no evidence to prove that the witnesses gave willfully false testimony or made willfully false statements. The fact that two of the eyewitnesses to the shooting testified that they did not remember telling police officers certain

things that the officers themselves testified about does not constitute perjury. Further, even if the testimony was error, defendant's substantial rights were not affected because the inconsistency between the witnesses' testimony and the testimony of the police officers was also observed by the jury, which was responsible for evaluating the witnesses' credibility.

Defendant next argues that there was insufficient evidence to support his convictions for assault with intent to do great bodily harm less than murder because the eyewitnesses all believed the shooter was a black male, whereas defendant is a white male. We review the evidence in a sufficiency challenge in a light most favorable to the prosecution to determine whether a rational jury could find that each element of the crime was proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). Identity is an element of every offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Defendant specifically challenges the evidence establishing identity.

Circumstantial evidence and the reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *People v Gayheart*, 285 Mich App 202, 216; 776 NW2d 330 (2009). In this case, there was circumstantial evidence identifying defendant as the shooter, including the testimony of defendant's neighbor that she observed someone whom she believed was defendant entering his home shortly after the shooting, and the discovery of shotgun shells matching those found at the scene of the crime in defendant's home. Additionally, Peggy testified that defendant left the house the night of the shooting with a shotgun, dressed all in black with a mask and indicated that he was going to Jackson Street to "get even." Peggy testified that defendant returned home shortly after the shooting and indicated that he opened fire into a group of people. Peggy testified that defendant was in possession of the same type of shotgun shell that was located at the scene of the crime, and that defendant indicated to her that he was worried that he dropped a shotgun shell. When this evidence is viewed in a light most favorable to the prosecution, it is clear that a rational jury could find that each element of the crime was proved beyond a reasonable doubt. *Nowack*, 462 Mich at 399-400.

Next, defendant argues that the trial court abused its discretion when it departed upward from the sentencing guidelines. The statutory sentencing guidelines range in this case was 38 to 152 months, but defendant was sentenced to a minimum of 228 months. This Court reviews a trial court's reasons for a departure from the sentencing guidelines for clear error. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). The trial court's conclusion that a reason is objective and verifiable is a matter of law reviewed de novo. *Smith*, 482 Mich at 300. Whether the reasons given for departure are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion. *Id.* The amount of departure from the guidelines is also reviewed for an abuse of discretion. *Id.* "A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes." *Id.*

We first determine whether the trial court articulated substantial and compelling reasons to justify its departure. The reasons for a particular departure must be objective and verifiable. *Id.* at 299. Further, the reasons must "keenly or irresistibly" grab the attention of the court and must be "of considerable worth in deciding the length" of the sentence. *People v Babcock*, 469 Mich 247, 258; 666 NW2d 231 (2003) (quotations omitted). A trial court must not base its

departure on “an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3)(b). The trial court articulated substantial and compelling reasons for departure in this case. Defendant shot two victims with a gun, but fired into a crowd of multiple children. The trial court noted that Offense Variable (OV) 3, which scores physical injury to the victim, MCL 777.33, does not allow for additional points when more than one victim is injured. Thus, the fact that defendant seriously injured two victims in this same act is not considered by OV 3. Offense Variable 9 addresses the number of victims, but does not consider whether victims are actually injured. Rather, OV 9 merely requires a finding that a certain number of victims placed in danger of physical injury. MCL 777.39. The trial court also noted that OV 4 considers psychological injury only to one victim, and does not account for the fact that multiple victims may have suffered psychological injury. MCL 777.34. Here, one victim had to take speech therapy and re-learn how to speak. The other victim has not sought professional treatment, but his victim impact statement suggests he was seriously psychologically injured. Additionally, the trial court noted that defendant engaged in multiple behaviors that could individually form the basis for scoring OV 19, but OV 19 may only be scored once. The trial court noted that even with these shortcomings in the guidelines’ ability to accurately reflect defendant’s conduct, defendant still scored 100 points; more than the 75 point cap reflected on the grid. See MCL 777.65 (Class D minimum sentence ranges scoring grid). The reasons set forth by the trial court were objective and verifiable and keenly grasp the court’s attention where the noted offender characteristics were not taken into account in calculating the recommended minimum sentence range under the legislative guidelines. Further, the trial court noted defendant’s history of escalating violence, which is objective and verifiable by reference to defendant’s presentence investigation report.

If there is a substantial and compelling reason for a departure, the extent of that departure is reviewed for an abuse of discretion. *People v Lowery*, 258 Mich App 167, 172; 673 NW2d 107 (2003). “A given sentence constitutes an abuse of discretion if that sentence violates the principle of proportionality, which requires that the sentence be proportional to the seriousness of the circumstances surrounding the offense and offender.” *Id.* This Court reiterated that shooting a person satisfies the principle of proportionality and is a substantial and compelling reason for the particular departure. *Id.* In this case, defendant opened fire on a group of children and then manipulated his wife into trying to cover up his actions. We find that the seriousness of the offense and the offender justify the trial court’s departure from the guidelines in this case.

Defendant also argues that he was improperly sentenced as an habitual offender, fourth offense, because the trial court relied on an inaccurate conviction. Because this issue was not raised before the trial court, defendant must establish plain error affecting substantial rights. *Carines*, 460 Mich at 752-753. The presentence investigation report indicates defendant was convicted of four previous felonies; thus, even if the felony conviction defendant claims was erroneous is not considered, the trial court properly sentenced defendant as a fourth-habitual offender.

Lastly, defendant argues that the trial court abused its discretion and showed bias when it asked Peggy questions during her testimony. No objection to the trial court’s conduct was made during trial. Therefore, this allegation of error is reviewed for plain error affecting substantial

rights. *Id.* A trial court is permitted to question witnesses in order to clarify testimony or elicit additional relevant information. MRE 614(b); *People v Conyers*, 194 Mich App 395, 404-405; 487 NW2d 787 (1992). In this case, it is apparent that the trial court was merely attempting to clarify Peggy's equivocal and resistant testimony. Nothing in the court's questioning pierced the veil of judicial impartiality. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). Defendant has failed to establish plain error affecting his substantial rights.

Affirmed.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck